Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

SANDRA TOWERS and ROBERT STURDIVANT,
individually and on behalf of those similarly situated,

*Petitioners,*

*v.*

CITY OF CHICAGO,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1) Whether municipal ordinances that impose punitive, in personam fines on a class of innocent vehicle owners violate substantive due process if the ordinances do not include equitable discretion, to abate or mitigate the fine, for those owners who took every reasonable precaution to prevent any unauthorized use of their cars and did not authorize anyone to use their cars?

a) Does this Honorable Court's decision in *Bennis* authorize in personam fines when the local ordinances do not include an innocent owner defense or equitable discretion to mitigate the fines?

2) Whether municipal ordinances that impose substantial mandatory, in personam fines on a class of innocent, non-negligent vehicle owners violate the Excessive Fines Clause or is a five hundred dollar fine and, in some cases, loss of the family car, a de minimus penalty as a matter of law, thereby eliminating any need to consider whether the punishment is grossly disproportional?

a) Does this Court's opinion in *Bajakajian* require municipalities, at a minimum, to consider an innocent vehicle owner's claim that the City's punitive, in personam fine is excessive?

## THE PARTIES TO THE PROCEEDING

The Parties to this proceeding are the Petitioners, Sandra Towers and Robert Sturdivant, both individually and on behalf of a class of persons similarly situated, and the Respondent, the City of Chicago.

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Petitioners, Sandra Towers and Robert Sturdivant, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for Seventh Circuit in *Towers v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999).

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Towers v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999). The opinion of the District Court, per Magistrate Arlander Keys, is reported at *Towers v. City of Chicago*, 979 F. Supp. 708 (N.D. Ill. 1998).

## STATEMENT OF JURISDICTION

On August 30, 1996, Petitioner Sandra Towers filed a six count complaint in the Chancery Division of Cook County Circuit Court, Case No. 96 CH 9337, against the City of Chicago. The City removed the state action to the District Court pursuant to 28 U.S.C. § 1441. The District Court had jurisdiction over the civil rights counts pursuant to 28 U.S.C. §§ 1331 and 1343(a) and supplemental jurisdiction for the state count pursuant to 28 U.S.C. § 1367.

On February 7, 1997, the parties consented in writing to trial before a magistrate under 28 U.S.C. § 636(c)(1). On September 30, 1997, Magistrate Arlander Keys issued a Memorandum Opinion and Order granting the City of Chicago's Motion to Dismiss with respect to all the federal and state claims. The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and this Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### A. Statutes and Ordinances Involved

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

U.S. Const. Amend. VIII.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

The relevant ordinances are voluminous so they are reproduced in Appendix F to this petition.

## STATEMENT OF THE CASE

The issue in this case is whether the City of Chicago can impose punitive, in personam fines, and deprive vehicle owners of the use of their cars, even when the owners did not personally violate any City ordinances, did not authorize anyone to use their cars, and took all reasonable precautions to ensure that their vehicles were not used unlawfully.

Petitioners filed claims for themselves and on behalf of a class of innocent vehicle owners whose cars were seized pursuant to City of Chicago (City) ordinances. *Towers v. City of Chicago*, 173 F.3d 619, 622-24 (7th Cir. 1999). Their complaint sought declaratory and injunctive relief as well as damages.

Petitioners described themselves, and the class, as innocent vehicle owners. They maintained they were "innocent owners" because they did not personally violate the City's ordinances, and they did not consent to any use of their cars by the persons who allegedly violated the ordinances. Nonetheless, Petitioners' cars were seized and Petitioners were forced to pay five hundred dollars plus towing and storage costs to retrieve the cars.

In the proceedings below, Petitioners did not claim that loss of use of the family car, plus a five hundred dollar fine, is always excessive, even as applied to innocent, non-negligent owners. Petitioners, instead, maintained that the fine, plus loss of use of the family car, can be excessive, and a violation of substantive due process, as applied to some non-culpable, vehicle owners.

Petitioners further maintained that the City must allow its administrative hearing officers the equitable discretion to consider, on a case by case basis, whether the fine, plus loss of use of the car, is an excessive and unwarranted punishment. Because the ordinances, as written and as applied, do not provide for equitable review or case by case proportionality review, Petitioners asked the lower courts to declare the ordinances unconstitutional.

The City conceded that its hearing officers do not have equitable discretion and, in that respect, Petitioners claimed the ordinances were in conflict with *Bennis v. Michigan*, 516 U.S. 442 (1996), and *United States v. Bajakajian*, 524 U.S. 321 (1998). However, neither of the courts below declared the City's ordinances unconstitutional. Petitioners' complaint was dismissed pursuant to Rule 12(b)(6) so the facts are not in dispute.

### A. The City's Ordinances

The City of Chicago has five vehicle impoundment ordinances that direct police officers to seize any vehicle that

was allegedly used in violation of the ordinances. Those ordinances prohibit: loud radios, curfew violations, transportation or use of narcotics, weapons violations, and prostitution. *See* Chicago Municipal Code §§ 11-4-1115 (loud radios), 8-16-020 (curfew), 7-24-225 (narcotics), 8-20-015 (weapons), 8-8-060 (prostitution). Following the seizure, the vehicle is towed to an impoundment area where it remains until the owner pays a five hundred dollar fine plus the towing cost and accumulated storage fees. *Towers*, 173 F.3d at 621 (1999). If the owner acts quickly, the vehicle can be retrieved for approximately six hundred twenty dollars. Storage fees accumulate at a rate of ten dollars per day for the first ten days and twenty dollars per day thereafter.

The City provides an administrative hearing within thirty days of the seizure. The ordinances, however, limit the vehicle owner's available defenses to cases where: (1) the vehicle was stolen and the owner reported it as stolen; (2) the vehicle was being used as a licensed common carrier and the operator of the vehicle did not have knowledge of the alleged ordinance violation; or (3) the owner proves that the presence of the controlled substance (or weapon) was authorized by law. *See e.g.*, Chicago Municipal Code § 7-24-225.

These ordinances are not calibrated based on the gravity of the offense — curfew violations are punished as severely as weapons and narcotics violations. Nor are they calibrated based on the culpability of the vehicle owner — an innocent owner who did not authorize anyone to use his car is punished as severely as a vehicle owner who is selling narcotics out of his car. *Towers*, 173 F.3d at 622-625. Nor are the ordinances calibrated to take into account the severity of the punishment as applied to the vehicle owner's unique circumstances — an affluent vehicle owner with more than one car and plenty of money in the bank pays the same fine as a welfare mom who lives from check to check.

It is not a defense that the owner was not present and did not participate in or condone the alleged ordinance violation. Nor is it a defense that the owner did not know the vehicle was being used in violation of any ordinance or law and had taken all reasonable steps to ensure that the vehicle was only used for a lawful purpose. The City imposes strict liability on the owner even when the owner did not authorize anyone to use his car.

**B. Undisputed Facts as to Petitioner Towers**

On January 27, 1996, Ray Chambers used Petitioner Towers's car without her permission. While driving Towers's car, Chambers was stopped by Chicago police officers, who allegedly found a controlled substance in the vehicle. Petitioner Towers was not aware that a controlled substance was in her car and she did not give Chambers, or any other person, permission to use her car, let alone to transport a controlled substance in her car. *Towers*, 173 F.3d at 623-627. On February 6, 1996, Towers paid the $500 fine and $225 in accumulated towing and storage fees so she could retrieve her car.

At the administrative hearing, Petitioner Towers was precluded from raising an innocent-owner defense or presenting evidence relating to the hardship she would suffer if the fine was not abated. *Towers*, 173 F.3d at 623-626. None of the ordinance's defenses applied to Petitioner Towers, so on March 8, 1996, a final administrative order was entered against her.

**C. Undisputed Facts As To Petitioner Sturdivant**

In September 1996, Chicago police officers seized and impounded Petitioner Sturdivant's car. According to the officers who seized the car, a person in possession of a handgun was in Sturdivant's parked car. Sturdivant was not present at the time of the seizure, and he was not aware that anyone was in his car. Nor did Sturdivant authorize anyone to enter his car, with or without a handgun.

Petitioner Sturdivant was precluded from asserting an innocent-owner defense at the final hearing and he was forced to pay a $500 fine, plus towing and storage fees. At first, Sturdivant was unable to pay the fine so he lost the use of his car for several days.

**D. Procedural History — District Court**

Before the City's administrative order was entered against Petitioner Towers, she filed a federal complaint against the City alleging various civil rights violations. *Towers, et al. v. City of Chicago*, 96 C 0995, (N.D. Ill. 1996) ("Towers I"). Towers I was filed on February 21, 1996 and was assigned to the Honorable James H. Alesia. Her complaint included a request for class certification, and she maintained that the City's administrative hearing process was unconstitutional. In particular, she alleged that the administrative hearing process should allow for an innocent owner defense and for equitable discretion to offset the hardship caused by the fines and loss of use of the family car.

The City filed a motion to dismiss Towers I contending, *inter alia*, that failure to seek state court review, via a common law writ of certiorari, was fatal to Petitioner's federal procedural due process claim. While not conceding that state court review was applicable, Petitioner Towers filed a state petition for writ of certiorari on August 30, 1996, and joined the 42 U.S.C. § 1983 and class action claims raised in Towers I. (Cook County Circuit Court Case No. 96 CH 9337).

Rather than allow for state court review, the City removed the state case to the District Court. This time Petitioner's case was docketed: *Towers, et al., v. City of Chicago*, Case No. 96 C 6510 (N.D. Ill. 1996) ("Towers II"), and was assigned to the Honorable Milton I. Shadur.

On October 9, 1996, Petitioner Towers filed her first amended complaint in Towers II, which added Petitioner

Sturdivant. On November 8, 1996, Towers II was reassigned to the Honorable James H. Alesia, and on November 13, 1996, Petitioners filed a Second Amended Complaint that added Kevin Amos as a plaintiff. *Towers, et al., v. City of Chicago*, 979 F. Supp. 708, 710 (N.D. Ill. 1997).

The parties consented in writing to trial before a magistrate and the City filed a motion to dismiss. On September 30, 1997, the Magistrate issued a Memorandum Opinion and Order that granted the City's Motion to Dismiss and denied Petitioners' Motion To Certify Class and Motion For Preliminary Injunction. *Towers*, 979 F. Supp. 708. Later, a Rule 59 motion to alter or amend the judgment, with respect to Kevin Amos only, was filed. Magistrate Keys, pursuant to a settlement agreement, entered an agreed order of dismissal between Kevin Amos and the City of Chicago.

**E. The District Court's Ruling**

Petitioners' Second Amended Complaint alleged that the City's ordinances were unconstitutional in that: (a) the ordinances imposed excessive fines on innocent vehicle owners; (b) the ordinances violated substantive due process because they did not provide for equitable discretion to reduce the hardship to innocent vehicle owners; and (c) the notice and pre-judgment attachment provisions of the ordinances are procedurally flawed. The City filed a Rule 12(b)(6) Motion to Dismiss and Magistrate Keys granted the motion.

The Magistrate found that Petitioners presented "both facial and as applied challenges with regard to procedural and substantive due process violations." With respect to the alleged procedural due process violations, the Magistrate found that the City's post-impoundment procedures conformed with *Mathews v. Eldridge*, 414 U.S. 319, 96 S. Ct. 893 (1970) and that notice to the alleged ordinances violator was fair notice to the vehicle owner.

Magistrate Keys then made the following findings with respect to Petitioners' substantive due process claims. First, the City's ordinances "are analogous to in rem forfeiture actions." *Towers*, 979 F. Supp. at 717. Second, this Honorable Court's decision in *Bennis* drew a distinction between innocent owners, who consented to the use of their cars, and innocent owners who did not consent to any use of their vehicles. *Towers*, 979 F. Supp. at 718. Third, Petitioners raised "the same arguments as did the plaintiff in Bennis." *Towers*, 979 F. Supp. at 718. Fourth, although the Second Amended Complaint alleged that Petitioners did not consent to the use of their cars, Magistrate Keys found Petitioners "wrongful or not, authorized others to use their automobiles." *Towers*, 979 F. Supp. at 718. Fifth, the City's ordinances differed from *Bennis* by limiting the fine to five hundred dollars rather than forfeiture of the car.

After assuming that Petitioners were culpable, because they did not report their cars as stolen, Magistrate Keys held that there was no meaningful distinction between the *Bennis* in rem forfeiture and the City's in personam fines. He found no substantive due process violation and no need for equitable discretion, even though he agreed that the state statute in *Bennis* included equitable discretion to protect the interests of innocent owners. *Towers*, 979 F. Supp. at 717-719.

Magistrate Keys made the following findings with respect to Petitioners' excessive fines argument. First, the Eighth Amendment applied to the City's ordinances. Second, Petitioners claimed that Eighth Amendment proportionality review was required at the City's administrative hearing stage. Third, the City's ordinances did not allow for proportionality review even when the claimant was an innocent owner. Fourth, *Bennis*, rather than the excessive fines cases, *Alexander v. United States*, 509 U.S. 549 (1993); *Austin v United States*, 509 U.S. 602 (1993), was the controlling authority. Fourth, under *Bennis* there is no constitutional right to proportionality review. Fifth, Petitioners claimed they "were unaware of, and did not authorize

the use of, their vehicles for illegal purposes." *Towers*, 979 F. Supp of 721. Sixth, the City's ordinances did not require proof that vehicle owners consented to any use of their cars. Seventh, if a car "is not reported stolen, even if an owner does not expressly consent to permit another to use his or her vehicle, the only rational conclusion is . . . the owner gave at least some degree of implied consent to that person to use the car, either before or after its use." *Towers*, 979 F. Supp. at 722. Eighth, if an owner consents, by implication and after the fact, then the owner is responsible for any unlawful use of the vehicle. Ninth, since Petitioners did not allege their cars were stolen they must "have, in some measure, consented to the use of their vehicle." 979 F. Supp. at 722. Tenth, because the ordinances do not require proof of consent, the City's ordinances did not violate the Excessive Fines Clause. *Towers*, 979 F. Supp. at 721-723.

**F. The Seventh Circuit's Analysis And Opinion**

Petitioners appealed the final judgment that was entered by the Magistrate. In their briefs to the United States Court of Appeals for the Seventh Circuit (Seventh Circuit), Petitioners raised the same constitutional arguments. The Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

They claimed that the City's ordinances violated substantive due process, as defined in *Bennis*, because the City's hearing officers did not have equitable discretion to nullify or mitigate the fines as applied to innocent owners. Petitioners also maintained, again, that the Excessive Fines Clause applied to the ordinances and that the ordinances did not provide for case by case proportionality review. Finally, Petitioners renewed their argument that the ordinances' notice provisions and prejudgment attachment were unconstitutional, at least as applied to innocent owners. *Towers*, 173 F.3d 619.

The Seventh Circuit rejected each of these arguments and affirmed the Magistrate's order dismissing the case.

## G. Excessive Fines — The Seventh Circuit Analysis

According to the Seventh Circuit, the City's fines serve "little or no remedial purpose" and the ordinances were enacted "in an effort to curb illegal drug and firearm activity . . ." *Towers*, 173 F.3d at 624. Therefore, the Court had to decide "whether they [the fines] violate the Excessive Fines Clause." *Towers*, 173 F.3d at 624.

The Court, citing *Bajakajian*, began by noting that each Petitioner had "unwittingly allowed his vehicle to be used as a receptacle for another's illegal item." *Towers*, 173 F.3d at 625. The Court then concluded that there was no evidence that Petitioners "were involved in any other illegal activity . . ." Petitioners, however, did not report their cars as stolen so "they must have given some degree of consent to the use of their cars . . . either before or after that use." *Towers*, 173 F.3d at 625. Based on that assumption, the Seventh Circuit held that Petitioners "were responsible for allowing their vehicles to be misused." *Towers*, 173 F.3d at 625.

Finally, the Court compared "the amount of the fines to the gravity of the plaintiffs' offense." *Towers*, 173 F.3d at 625. Five hundred dollars was "not a trifling sum," but the City was entitled to "take into consideration that the ordinances must perform a deterrent function . . ." *Towers*, 173 F.3d at 626. The Court believed the fines would induce vehicle owners "to ask borrowers hard questions . . . or to refrain from lending the vehicle whenever the owner has a misgiving about the items that might find a temporary home in that vehicle." *Towers*, 173 F.3d at 626. For that reason, the Court held that the "fine imposed . . . is large enough to function as a deterrent, but it is not so large as to be grossly out of proportion to the activity that the City is seeking to deter." *Towers*, 173 F.3d at 626.

## H. Substantive Due Process — The Seventh Circuit Analysis

Petitioners maintained that *Bennis* was distinguishable from their case on at least two grounds. "[F]irst, Bennis involved in rem forfeitures whereas this case involves in personam fines, and second, the statute in Bennis provided the courts with equitable discretion to protect innocent owners whereas the ordinances in this case do not." *Towers*, 173 F.3d at 626. Petitioners claimed that those differences, when applied to the City's fines, required a different result in their case. The Seventh Circuit disagreed.

With respect to this constitutional issue, the Seventh Circuit sided "with the City that any distinction between in rem forfeitures . . . and in personam fines . . . is one of form, but not substance." *Towers*, 173 F.3d at 626. The only substantive difference the Court perceived, between the *Bennis* in rem proceeding and the City's in personam fines, was that "the in personam fine results in a fixed economic penalty." *Towers*, 173 F.3d at 627.

This perceived functional difference led the Seventh Circuit to conclude that equitable discretion, like that provided in the Michigan statute in *Bennis*, was not necessary as applied to the City's fines. The court noted:

> Discretion to mitigate an innocent owner's forfeiture is less important when, as in this case, the statute or ordinance imposes a fixed fine rather than forfeiture of an entire item regardless of its value, because a fixed fine removes the potential for drastically, or exorbitantly, harsh penalties on an innocent owner. Therefore, these ordinances are not subject to the danger of "exorbitant applications."

*Towers*, 173 F.3d at 627.

### I. Procedural Due Process Analysis — The Seventh Circuit Analysis

Petitioners maintained that "timely notice of the right to contest the loss of property is . . . an essential part of procedural due process." *Towers*, 173 F.3d at 627. The parties agreed "that the use of one's automobile . . . is a property right protected by the Due Process Clause." *Towers*, 173 F.3d at 628 (citing *Sutton v. City of Milwaukee*, 672 F.3d 644, 645 (7th Cir. 1982). Thus, the issue for the Seventh Circuit was whether notice to the person who violated the ordinance was adequate notice to an innocent owner, who must request a preliminary hearing within twenty four hours of the seizure. The Court acknowledged that: (a) the person who used the car might not be interested in notifying the owner that the car was impounded; and (b) the ordinance violator might be in custody and unable to promptly notify the owners.

These deficiencies in the notice provisions caused the court some concern. However, the Court concluded that Petitioners would not have prevailed at the preliminary hearing stage, since none of the ordinances' defenses applied to them, so that any deficiency in the notice was harmless.

The court, therefore, affirmed the Magistrate's order dismissing the case and further held that the class certification motion was moot.

## REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari for several reasons. First, the Seventh Circuit's opinion creates a case of first impression for this Honorable Court on a topic which is ripe for review. The proliferation of quasi forfeiture laws, that are pushing constitutional extremes, calls for a clear statement of the constitutional outer limits on legislation that punishes the innocent. Second, the Seventh Circuit's opinion creates a conflict among the circuits with respect to important constitutional concerns. Third, the Seventh Circuit misapplied

this Court's holdings in *Bennis* and *Bajakajian* and thereby created unnecessary confusion on constitutional issues that are sure to recur.

## I.

## THE SEVENTH CIRCUIT'S OPINION RAISES AN ISSUE OF FIRST IMPRESSION.

Prior to the Seventh Circuit's decision in Petitioners' case, no court had held that a municipality could impose a punitive, in personam fine on an innocent, non-negligent vehicle owner. In *Bennis v. Michigan*, 516 U.S. 442 (1996), this Honorable Court upheld a Michigan in rem forfeiture action. But this Court based its holding on the history of in rem actions and the equitable discretion, vested in the state court, to offset undue hardships for innocent owners. The Seventh Circuit applied *Bennis* to an in personam fine and to an ordinance which was devoid of equitable discretion.

In *United States v. Bajakajian*, 524 U.S. 321 (1998), this Honorable Court held that a mandatory in personam fine was unconstitutional as applied to an admittedly guilty person. The Seventh Circuit side stepped *Bajakajian* by noting that the City's fixed penalty, five hundred dollars plus towing costs and storage fees, always was proportional to the alleged ordinance violations. Thus, the issue presented here falls between the holdings in *Bennis* and *Bajakajian*.

The Seventh Circuit's opinion, while a case of first impression, is at odds with the historical analysis this Court applied in *Bennis* and in *Bajakajian*. As a result, the Seventh Circuit's opinion creates a conflict or, at a minimum, more uncertainty among the circuits. This Court should grant the writ to resolve: (a) whether a municipality can impose punitive, in personam fines on innocent owners; and (b) if municipalities have that authority, what, if any, constitutional restraints limit the authority to punish the innocent. Put another way, the

question is whether innocence is a constitutional irrelevancy. Petitioners maintain that, at the very least, innocence must be considered as a mitigating factor before punishment is imposed.

The need for constitutional clarity is particularly pressing on this rapidly expanding issue. With increasing regularity, state and local governments are passing forfeiture legislation as a means of generating money. These ordinances often have lawful intentions mixed with an interest in generating money. *See* Range and Witkin, *The Drug-Money Hunt*, U.S. News and World Report, August 21, 1989, p. 22; Heilbroner, *The Law Goes on a Treasure Hunt*, N.Y. Times, Dec. 11, 1994, p. 70, col. 1. To ensure that economic interests don't trample on fundamental rights, this Honorable Court should establish a procedure by which constitutional limits must be measured.

Forfeiture ordinances are money making machines. More than a billion dollars in assets were on deposit with the United States government in 1998. *See Making It Harder To Seize Property*, New York Times, June 29, 1999, at 5, 22. The stakes are so high that government agencies fight among themselves to get bigger pieces of the forfeiture pie. *See Forfeiture Spoils, Conflicting Laws Spark High-Stakes Battle*, Chicago Daily Law Bulletin, July 6, 1999, at 3, 24.

Increasingly, the focus of these law is less on crime and more on fund raising. United States Representatives Bob Barr, Georgia, recently remarked that, "the monetary tail [is] wagging the law-enforcement dog." *Making It Harder To Seize Property*, at 22. The former chief of the Bronx Attorney General's forfeiture unit noted that "Forfeiture laws have run amok. The focus is no longer on combating crime. It's on fund raising." *Forfeiture Spoils*, at 3.

The potential for local ordinances that push the constitutional envelope to its outer limits is becoming a day to day reality as the financial stakes increase. *See* Range and Witkin, *The Drug-Money Hunt*, U.S. News and World Report,

August 21, 1989, p. 22; Heilbroner, *The Law Goes on a Treasure Hunt*, N.Y. Times, Dec. 11, 1994, p. 70, col. 1. In the three months since the Seventh Circuit decided Petitioners' case, the Town of Cicero (a Chicago suburb) and the County of Cook passed similar quasi-forfeiture legislation. Cicero proposes five hundred to seven hundred and fifty dollar fines on any alleged gang member who drives a car within the town limits. Cook County's recent legislation imposes similar fines on any vehicle owner whose car is used to transport fireworks. More such ordinances are sure to come.

As Justice Thomas observed in *Bennis*, "Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners . . . ." *Bennis*, 516 U.S. at 456. For the innocent, the City of Chicago's roulette wheel has no winning numbers.

Neither the Magistrate nor the Seventh Circuit had a fully developed record with respect to the fact intensive analysis that *Bajakajian* and *Bennis* require. For example, the Seventh Circuit held that the fine and loss of use of the car were necessary "to induce vehicle owners to ask borrowers hard questions about the uses to which the vehicle would be put or to refrain from lending the vehicle whenever the owner has a misgiving about the item that might find a temporary home in that vehicle." *Towers*, 173 F.3d at 627. But the court had no reason to assume that Petitioners neglected to ask the "hard questions" or that petitioners had any "misgivings." In fact, as alleged here, neither Petitioner consented to any use of their cars.

Nor does it make any difference, under the City's ordinances, whether the hard questions were asked or that there was no reason to suspect an illegal item might find a temporary home in the owner's vehicle. These considerations, while relevant under *Bajakajian & Bennis*, are irrelevant to the City. No matter how many hard questions are asked and no matter how scrupulously careful the owner is, he loses under the City's ordinances.

There must be a constitutional outer limit beyond which forfeitures and in personam fines cannot be pushed. This Court reserved that question in *J. W. Goldsmith Co. v. United States*, 254 U.S. 505, 512 (1921) "when such application shall be made it will be time enough to pronounce upon it" and again in *Bennis*, where the state statute allowed for equitable discretion to prevent exorbitant applications. The time to pronounce upon this question is now at hand.

## II.

## THE SEVENTH CIRCUIT'S OPINION CREATES A CONFLICT AMONG THE CIRCUITS.

The Seventh Circuit's opinion sweeps the *Bennis* and *Bajakajian* equitable considerations under the rug. In effect, the court found that loss of the use of the family car, plus a five hundred dollar fine and towing and storage costs, is de minimus so proportionality review is not required. *But see*, *United States v. Sarbello*, 985 F.2d 716 (3rd Cir. 1993); *United States v. Alexander*, 108 F.3d 853 (8th Cir. 1997); *United States v. Real Property Known and Numbered, As 415 East Mitchell Avenue*, 149 F.3d 472 (6th Cir. 1998).

Petitioners do not claim that the City's fines are excessive when applied to people who themselves violate the ordinances. Nor do Petitioners claim that the City's hearing officers always must abate the fine as applied to innocent vehicle owners, those who did not violate the ordinance, did not authorize anyone to use their cars, and took reasonable steps to assure that their cars were only used for lawful purposes.

Even as to these innocent owners, the requested remedy is merely a hearing at which their innocence is a potential mitigating factor. Vehicle owners who fall into this discrete category are constitutionally entitled to assert equitable defenses that either nullify or abate the proscribed penalties.

By denying Petitioners, and the class they represent, the right to submit evidence that they did not authorize any use of their cars or that they would suffer an undue hardship if fined, the Seventh Circuit created a conflict among the circuits. *See Sarbello* and *Alexander*, *supra*.

The historical basis for the Eighth Amendment included a concern for the person's ability to pay the fine. It was not the size of the fine alone but rather the fine as compared with the ability to pay it that led to the excessive fines provisions in the Magna Charta and the English Bill of Rights. According to Blackstone, "no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear." 4. William Blackstone, *Commentaries* 372. Thus, the history of the Excessive Fines Clause suggests that the circumstances of the person being fined are relevant considerations. Magna Charta, 9 Hen. III. Ch. 14 (1225), Stat. At Large 6-7 (1762 ed.) as cited in *Bajakajian*, at 2037.

Petitioners maintained that the City's ordinances flunk that constitutional test and the City concedes that no such inquiry is allowed by its ordinances. The Seventh Circuit, nonetheless, held that as long as the fine is not too large, the ability to pay it is irrelevant.

Ordinances that punish the guilty are not at issue here. Instead the constitutional question is what is the outer limit for punitive fines that are imposed on persons innocent of any wrongdoing? Is it a fixed amount, say $100,000 dollars, or is due process a more flexible concept? The Seventh Circuit held that a five hundred dollar fine plus an indefinite loss of use of the family car never violates the Due Process Clause or the Excessive Fines Clause. As a result, there is no need for equitable discretion or case by case proportionality review of the City's ordinances, according to the Seventh Circuit. *But see Alexander*, *supra*.

Would the result be the same, if the fine were significantly higher? Perhaps not, but the Seventh Circuit's analysis leaves the City, and any other municipality that reads the *Towers* opinion, free to up the ante.

Because the Seventh Circuit affirmed a Rule 12(b)(6) dismissal order, the Court's holding apparently applies to anyone, not just the Petitioners. The Court did not know the details of Petitioners' efforts to prevent others from using their cars nor did the Court know how severe the City's punishment was, as applied to Petitioners' personal circumstances.

Petitioners had alleged that no one had permission to use their cars and that they did not know of, authorize or condone any use of their cars, let alone an illegal use. The Seventh Circuit Court brushed those allegations aside and found, without any supporting evidence, that Petitioners pled their way out of court by admitting they did not report their cars as stolen.

If that is true for Petitioners, there is no reason to believe a different rule applies for anyone else. Failure to report the car as stolen is an admission of guilt and the City's fixed punishment is plainly fair, according to the Seventh Circuit, a result which is in direct conflict with this Court's decision in *Bajakajian*.

It does not matter whether the person who entered Sturdivant's car was a total stranger, a juvenile prankster, or a thief looking for valuables left in the car. Nor does it matter that the police saw no reason to charge the culprit with car theft or that Petitioner Sturdivant knew less about the circumstances of the arrest then the police knew. Sturdivant loses because he did not report his car as stolen regardless of any other relevant equitable concerns.

The same is true for Petitioner Towers. She alleged that Chambers, the person caught driving her car, did not have permission to use her car at all. The Seventh Circuit, nonetheless, imputed after the fact consent because Towers did not report her car as stolen.

A hearing, at which her failure to report the car as stolen, is taken into account is all that Petitioner Towers requested. But, at that hearing, she should be allowed to present evidence that she had asked the "hard questions" and she had no misgivings because, for example, she told Chambers never to use her car.

By drawing a per se, adverse inference from the failure to report Petitioners' cars as stolen, the Seventh Circuit eliminated the equitable discretion that saved the Michigan statute in *Bennis*. In that respect the City's fines are like the mandatory fine in *Bajakajian*. But this Court held that the *Bajakajian* fine was unconstitutional as applied to a guilty party. The City imposes its fines even on the innocent.

The only explanation for these incongruities is that the Seventh Circuit believes a five hundred dollar fine and loss of use of a car is de minimus so that equitable discretion is unnecessary. The Seventh Circuit refused to consider Petitioners' personal circumstances and, in that regard, the Court's proportionality analysis is flawed and is in direct conflict with the Eighth Circuit's analysis of this issue in *Alexander*. This Court should grant the writ of certiorari to resolve that conflict.

## III.

## THE SEVENTH CIRCUIT'S ANALYSIS OF *BENNIS* IS FUNDAMENTALLY FLAWED.

*Bennis* holds that when vehicle owners consent to the use of their cars, the cars are forfeitable in an in rem proceeding. However, that rule has at least three caveats.

First, the forfeiture is limited to in rem proceedings and is based on "a long and unbroken line of cases" applying the fiction that the res, not the owner, is being punished. *Bennis,* 516 U.S. at 446; *The Palmyra* 12 Wheat. 1, 14, 6 L. Ed. 531 (1827). Second, the res is not forfeitable when it was used without the owner's consent. *Id.* at 448, n.5. In rem forfeiture cases draw a

distinction between those situations where a vehicle is used without the owner's consent and those where the owner consented to a use, even if he was not aware of, and did not authorize, the manner in which the vehicle was used. *See J.W. Goldsmith, Jr. Grant Co. v. United States*, 254 U.S. 505, 512 (1921). Third, even when the owner consents and the proceeding is in rem, there must be some measure of equitable discretion, like that applied by the Michigan judge in *Bennis*, to offset the hardship caused to innocent owners.

The City's ordinances impose in personam fines and they do not allow for equitable set-offs so they are beyond the constitutionally permissible boundaries, even for in rem proceedings.

In fact, Petitioners' claims are more compelling than the ones presented in *Bennis* and *Bajakajian*. Petitioners committed no crimes and were not even present when the alleged ordinance violation occurred. In *Bajakajian*, the claimant was personally guilty of a felony offense and, in *Bennis*, although the res not the owners was punished, one of the vehicle owners was guilty of a criminal offense. Neither Towers nor Sturdivant was guilty of any misconduct, a fact that enhances their equitable claims.

As Justice Ginsburg explained in *Bennis*, "the car in question belonged to John Bennis as much as it did to Tina Bennis." 516 U.S. at 457. Thus, John Bennis "at all times had her (Tina Bennis) consent to use the car . . . ." *Id.* Petitioners' case presents different circumstances because here it is alleged that the owners (Towers and Sturdivant) did not authorize anyone to use their cars.

Thus, *Bennis* is distinguishable on at least three grounds. First, the proceeding in *Bennis* was in rem. Second, in *Bennis* the in rem forfeiture was directed at a co-owner of the car and that co-owner had committed the underlying criminal offense. Third, the nuisance abatement statute in *Bennis* included the equitable discretion to mitigate the fine in response to a claim

of innocent ownership. No such discretion is allowed by the City's ordinances.

These distinctions are compelling evidence that *Bennis*, as applied to the City's ordinances, requires a finding in favor of Petitioners.

## IV.

## THE SEVENTH CIRCUIT'S EXCESSIVE FINES ANALYSIS IS FLAWED.

Both the District Court and the Seventh Circuit held, without stating, that the Excessive Fines Clause is applicable to the States and their political subdivisions. Like the protection from excessive bail, the English version of the excessive fines prohibition was intended to curb the excesses of English judges under the reign of James II. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). The protection against excessive bail is incomplete without the prohibition against excessive fines; both protected the King's enemies from imprisonment, the first from incarceration prior to trial and the latter after imposition of sentence. *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267(1989) ("In the 1680's the use of fines 'became even more excessive and partisan,' and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed.")

The Framers of our Bill of Rights were aware, and took account of, the abuses that led to the 1689 Bill of Rights. *Browning-Ferris Industries v. Kelco*, 492 U.S. at 267, citing 2 J. Story, *Commentaries on the Constitution of the United States* 624 (1873). The "predominate political impulse" of proponents of the Bill of Rights "was distrust of power, and they insisted on constitutional limitations against its abuse." *Weems v. United States*, 217 U.S. 349, 372 (1910). The rationale for imposing upon the States the prohibition against excessive bail applies

equally to excessive fines. This Court should affirm that part of the lower courts' holdings that held the fines imposed under the City's ordinances are subject to the limitations of the Excessive Fines Clause.

Petitioners' complaint alleged that under the City's five ordinances, a "civil penalty" will be imposed upon them which constitutes a "personal debt due and owing" the City. The complaint further alleged that the fines imposed are excessive for they are grossly disproportionate to their culpability as innocent, non-negligent owners of vehicles in which a violation occurred. Complaint at 25-31. Petitioners never consented to allowing their vehicles to be used in any illegal manner nor "knew or should have known" that an occupant of their vehicle would violate the ordinances in their vehicle. Some class members did not consent to the use of their cars at all. Petitioners allege that the fine imposed upon them will range between five hundred dollars and temporary loss of the use of their vehicle to, in the case of those unable to pay the fine, towing and accrued storage charges, the total loss of their vehicle.

The Seventh Circuit stated that the fines "appear to serve little or no remedial purpose;" rather, it is "clear" that the fines serve the punitive purpose of deterring owners from "allowing" their vehicles to be used for illegal purposes. The court noted that the City admitted, at oral argument, that the ordinances were enacted to supplement the criminal laws with "a deterrent that does not require the government to meet the high burden of proof required for a criminal conviction." The opinion reasoned that under *Austin v. United States,* 509 U.S. 602 (1993) and *Bajakajian*, the fines constituted payment "as punishment for some offense" subject to the confines of the Excessive Fines Clause. It held that the fines need to be evaluated "on the facts of a particular case" and that their review of whether such fines were grossly disproportionate to the gravity of plaintiffs' offenses was *de novo.*

The court described the members of the class as those who have "unwittingly allowed their vehicle to be used as receptacles for another's illegal item." However, the opinion refuses to accept the "notion that the plaintiffs must be considered completely lacking in culpability." The court reasoned that since the owners did not timely report their vehicles as stolen, each must have "given some degree of consent to the use of their car by others, either before or after that use" and that, under *Bennis,* innocent owners may be held responsible for the vehicle's "misuse."

*Bennis*, however, does not stand for the proposition that a state has *carte blanche* to enact legislation which targets and punishes innocent owners. Instead, this Court held in *Bennis* that, within the Michigan statutory scheme, Mrs. Bennis' due process rights were not violated when she, an innocent spouse, was punished as a secondary consequence of the rightful punishment of her husband by the forfeiture of their jointly-owned vehicle.

The Michigan statutory scheme included a chancellor with equitable discretion to avoid "exorbitant applications of the statute." *Bennis* at 457 (Ginsburg, J., concurring). Here, the Chicago ordinances target the owner of vehicles knowing that, within its net, it will catch and punish completely innocent persons; for some, the punishment will be the loss of their vehicle. The Excessive Fines Clause "limits the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends" and is intended "to prevent the government from abusing its power to punish." *Browning-Ferris Industries v. Kelco*, 492 at 266-6. The City has abused its prosecutorial powers for improper ends by punishing the innocent to fill its coffers.

The complaint defines the class as persons who did not engage in any conduct proscribed by the ordinances, did not violate any state or federal law, did not consent to, know of,

have reason to know of, or could have prevented an ordinance violation in their vehicle. Complaint at 25-31. The alleged class includes some members, like the named Petitioners, who did not consent to the use of their vehicle at all but who did not report their vehicles stolen within twenty four hours of their loss of possession. Nonetheless, the Seventh Circuit found that all members were, to some extent, culpable and the fine, therefore, not excessive.

The court justified the City's imposition of fines upon innocent owners based upon the legitimate deterrent function served; that such deterrence would force vehicle owners to ask "hard questions" to prospective borrowers of their vehicles "whenever the owner has a misgiving about the items that might find a temporary home" in their vehicle. This analysis illogically assumes that faultless behavior can be properly influenced by imposing a deterrence sanction. It cannot. Even if a class member has no reasonable misgivings about the individual who wants to borrow her vehicle and asks every hard question imaginable to such person, she still will be punished under the ordinance if a violation occurs in the vehicle.

For example, Parishioner loans her car to Minister to attend a church picnic. En route, Minister sees Teenager shot and in need of emergency medical attention. Minister carries Teenager to the vehicle and drives him to the nearest hospital where Teenager receives lifesaving medical assistance. Medical personnel discover a marijuana cigarette in teenager's pocket. Under the ordinance, law enforcement may impound Parishioner's vehicle and she has no defense to imposition of the City's "civil penalty." If she is without sufficient funds to pay the fine, the City will sell her car to satisfy the fine.

During oral arguments in the Seventh Circuit, the City admitted that certain abuses under the ordinance can only be avoided by police discretion. A panel member asked whether his car could be impounded if his parking lot attendant, with a

marijuana cigarette in his pocket, was stopped while parking the judge's vehicle. The City admitted that a violation would "technically" occur, but assured the court that executive discretion would prevent impoundment or imposition of a fine. These assurances mean little to the plaintiff class who might be on the other end of law enforcement's "discretion." To have their right against excessive fines contingent upon such discretion is tantamount to making it illusory.

It is this discretion which makes these ordinances potentially very dangerous. For instance, the deterrence against police abuse contained in the exclusionary rule fades with enforcement of these ordinances. Although tainted evidence from an illegal stop is excluded at the criminal trial, it is admissible at the City's impoundment hearing and only the innocent are punished. The lack of any culpable state of mind of the occupants of the vehicle also is no defense. For example, Parent permits Child to borrow car on the condition Child returns by 10:30 p.m. — one half hour before the proscribed curfew. On the way home, Child has a flat tire. By the time the tire is fixed, it is 11:05 p.m. The ordinance authorizes seizure of the vehicle and the mandatory fine will be imposed on Parent even though the violation was accidental and unavoidable.

Both the majority and dissenting opinions in *Bajakajian* instruct that the first consideration in determining whether a fine is excessive is to defer to the legislature "in the first instance" as to the appropriateness of the penalty. *Bajakajian* at 2037; *Bajakajian* at 2044 (Kennedy, J, dissenting). Under the City's legislation, a first-time offender of the noise ordinance, the person actually driving the vehicle in which loud noise is played who is charged with a criminal offense, may only be fined a maximum of fifty dollars for his conduct while the vehicle's owner's fine will be tenfold. Municipal Code § 11-4-1115. The curfew ordinance contains no provision permitting imposition of any fine on the violating juvenile while the vehicle owner must be fined five hundred dollars. The

disparity between the legislative scheme's assessment of a reasonable fine for the actual ordinance violator support Petitioners' contention that the fine is grossly disproportionate to the gravity of their offense.

The complaint alleges that the City's fines are both excessive and disproportionate because Petitioners are being penalized without culpability. Penalizing innocent persons is so disproportionate and excessive that "in justice the punishment is more criminal than the crime." *United States v. Sarbello*, 985 F.2d 716, 724 (3rd Cir. 1993). In this respect, both the district and Seventh Circuit courts erred when concluding that all members of the class have failed to allege a Section 1983 claim based upon a violation of the Excessive Fines Clause of the Eighth Amendment.

## CONCLUSION

For all of these reasons, Petitioners respectfully request that this Court issue its writ of certiorari to review the judgment of the United States Court for the Seventh Circuit in *Towers v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999).

Respectfully submitted,

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